

Hon Robert S. Lasnik
MOTION DATE: SEPTEMBER 9, 2016

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

QOTD FIRST INVESTMENT LTD,)	
)	
Plaintiff,)	NO.16-cv-00371 RSL
)	
vs.)	
)	
MARY STARR ET AL,)	MOTION TO DISMISS, OR FOR A
)	MORE DEFINITE STATEMENT
Defendant.)	
)	SONNY NGUYEN
)	
)	

SUMMARY

Defendant Sonny Nguyen moves the Court for an order to dismiss Plaintiff QOTD's First Amended Complaint (Dkt 16) pursuant to Fed R. Civ P. 12(b)(6) for failure to state a claim upon which relief can be granted. QOTD fails to plead facts supporting its claim that Nguyen is an infringer. QOTD also fails to state a claim under well-known secondary liability theories of infringement as developed by the Courts. QOTD improperly uses the complaint process as a discovery tool in violation of Fed. R. Civ P. 11.

In the alternative, Nguyen seeks an order requiring QOTD to file a more definite statement pursuant to Fed. R. Civ P. 12(e).

MOTION TO DISMISS or MORE DEFINITE STATEMENT BY SONNY NGUYEN	Law Office of Joseph Chalverus Lake City Law Center P.O. Box 25050 Seattle WA 98165 (206)361-4840
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INTRODUCTION

QOTD's "pay-up-or-else" business model has become popular in this and other judicial districts.¹ QOTD's First Amended Complaint ("Complaint") contains mostly irrelevant material cut-and-pasted from other lawsuits filed in this and other jurisdictions. The Complaint describes how a "swarm" of people using commonly available peer-to-peer software ("BitTorrent") on the internet combine to download bits or pieces of a movie "*Queen of the Desert*" from each other, in order to copy or view it in its entirety.

QOTD improperly uses the federal court system. QOTD files complaints and amended complaints as a discovery mechanism. QOTD attempts to force IP subscribers to disclose who use the internet by suing them then expecting them to defend themselves until they disclose who the guilty party really is, if they know or---pay up if they don't know. This practice violates Fed. R. Civ. P. 11. This is like suing a passenger or owner of a vehicle to learn the name of the driver responsible for a traffic accident.

QOTD claims to have identified IP addresses of a BitTorrent swarm with their general geographic location. Plaintiff then prepares and files an Original Complaint against various John Does having those IP addresses. Plaintiff then motions for an *ex parte* order directed to their Internet Service Provider ("ISP") in order to obtain the actual names and addresses of the subscribers with these IP addresses.

¹ <https://torrentfreak.com/100000-p2p-users-sued-in-us-mass-lawsuits-110130/>

1 Here an order was obtained, *ex parte* and served upon COMCAST, Nguyen's ISP.
 2 COMCAST presumable responded with the names and addresses of its subscriber information
 3 which includes the name of Sonny Nguyen and his billing address.
 4

5 **THE 1st AMENDED COMPLAINT**

6 QOTD makes broad and conclusionary allegation that the Defendants---including Sonny
 7 Nguyen--- engaged in Copyright Infringement through use of an online distribution system by
 8 participating in a swarm and/or reproduced and/or distributed a "seed file" of its video-
 9 production, "*Queen of the Desert*" directly or with other defendants. (First Amended Complaint)
 10 page 12, lines 18-21). QOTD identified Sonny Nguyen as the subscriber assigned by
 11 COMCAST having the IP address used at the time of the alleged infringement.
 12

13 The Complaint is written to alarm its target audience: naive cable and internet
 14 subscribers. Instead of describing facts to support a legal cause of action QOTD obfuscates its
 15 Complaint by using the words "*the defendant*" instead of "*IP address holder*" or "*COMCAST*
 16 *subscriber*" or "*COMCAST customer*" or "*the person responsible for paying for Cable and the*
 17 *internet thru COMCAST.*" By doing so IP subscribers believe that they are infringers even if
 18 they did not infringe or even if they know who the infringers are. By service of process of these
 19 complaints, QOTD, can extort large sums of money from its audience....ordinary cable and
 20 internet subscribers. Many of these subscribers make arrangements with a Plaintiff to avoid an
 21 expensive and time consuming Copyright lawsuit. The remaining COMCAST subscribers,
 22 perhaps unaware of infringing or unauthorized downloading or who deny having downloaded
 23 Plaintiff's movie end up as named defendants solely because they are internet subscribers.
 24

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ARGUMENT

Specificity is needed for Direct Infringement.

A complaint under the Copyright Act of 1976 (17 U.S.C. § 101 *et seq.*) may not just allude to the possibility of an infringement by a defendant. A proper copyright complaint must allege with specificity that the person—defendant-- copied in whole, or in part from plaintiff’s work.

Factual allegations must be enough to raise a right to relief above the speculative level, see 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, pp. 235-236 (3d ed.2004) (hereinafter Wright & Miller) ("[T]he pleading must contain something more . . . than . . . a statement of facts that merely creates a suspicion [of] a legally cognizable right of action"), on the assumption that all the allegations in the complaint are true (even if doubtful in fact),....(Citations omitted).

Bell Atlantic Corp. v Twombly, 550 US 544, 127 S. Ct. 1955, 167 L.Ed.2d 929 (2007)

The person who pays the COMCAST bill is not necessarily the one who watches Cable or uses the internet. Knowing only an IP address and a COMCAST customer’s name and address at a known time and date is not enough to support a copyright infringement claim. Moreover, an IP holder, even if the IP subscriber knows or suspects who the infringer may be is not an infringer, either. The confusion created by plaintiff by mixing the concept of “infringer” with the concept of “cable customer” ignores important factual and legal distinction between the person who pays for the internet and person who may use the internet. A person paying the cable bill is not a copyright infringer only because an assigned IP address was used at the time for a peer-to-peer swarm in order to watch or download movies, even if it

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1 happened. QOTD's claim is patently speculative.

2 QOTD has the duty to state sufficient and relevant facts supporting its allegations that
 3 the COMCAST customer is the person engaged in copyright infringement, Nowhere does
 4 QOTD make these factual claims against Sonny Nguyen. Nowhere in the First Amended
 5 Complaint does QOTD allege facts showing Sonny Nguyen participated in the "swarm" to
 6 download "*Queen of the Desert*." QOTD limited its investigation to collecting cable-internet
 7 subscriber information from COMCAST. QOTD's only "information and believe" is that the
 8 defendants are Cable-Internet subscribers. QOTD filed its complaint against the defendants
 9 without conducting additional investigation regarding the identify of the offenders. This is an
 10 abusive practice. This practice violates Fed. R. Civ. P. 11. This should not be permitted.
 11

12 13 **SECONDARY INFRINGEMENT CLAIMS**

14 The Copyright Act of 1976 (17 U.S.C. § 101 *et seq.*) imposes personal liability. It does
 15 not expressly render anyone liable for infringement committed by another person. *Sony v*
 16 *Universal City*, 464 U.S. 417, 434 (1983). However, various Courts have developed the three
 17 well-known common-law doctrines of secondary liability, available under limited circumstances:
 18 *contributory infringement*, *vicarious infringement*, and *inducement of infringement*.
 19

20 Perhaps cognizant that its claims of *direct* infringement by a subscriber is flawed, QOTD
 21 alleges in its complaint that internet account holders are legally responsible *for others* using the
 22 IP address, with a general secondary infringement argument.

23 QOTD claims Sonny Nguyen engaged in secondary infringement by "*permitting*,
 24 *facilitating* and *materially contributing* to infringement or *failed to secure and protect*" the use

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1 of the assigned IP address from improper purposes such as piracy. (1st Amended Complaint,
2 ¶ 43, pgs 12-13)

3 “In doing so, each Defendant has directly, indirectly and/or contributorily (sic) violated
4 Plaintiff’s exclusive rights...” (First Amended Complaint ,page 13, lines 4-5).

5 There is no authority under existing law or under a good-faith proposal for an extension
6 of existing law that supports the imposition of liability for the conduct alleged. Importantly, the
7 Ninth Circuit and the U.S. Supreme Court have rejected the theory of secondary infringement,
8 except for the three important exceptions describe below.

9 10 **(1) Contributory Infringement**

11 A person with knowledge of the infringing activity induces, causes, or materially
12 contributes to infringing conduct of another, may be held liable as a *Contributory Infringer*.
13 “(O)ne who, with knowledge of the infringing activity, induces causes or materially contributes
14 to the infringing conduct of another may be held liable as a ‘contributory’ infringer.’”
15 *Gershwin Publishing Corp. v. Columbia Artists management,, Inc* 443 F.2d 1159, 1162 (2d Cir.
16 1971)at 1162.

18 “Contributory infringement originates in tort law and stems from the notion that one who
19 directly contributes to another's infringement should be held accountable. *See Sony v.*
20 *Universal City*, 464 U.S. at 417; 1 Niel Boorstyn, Boorstyn On Copyright 10.06[2], at 10-
21 21 (1994) ("In other words, the common law doctrine that one who knowingly
22 participates in or furthers a tortious act is jointly and severally liable with the prime
23 tortfeasor, is applicable under copyright law"). Contributory infringement has been
24 described as an outgrowth of enterprise liability, *see* 3 Nimmer 1204[a][2], at
1275; *Demetrigdes v. Kaufmann*, 690 F. Supp. 289, 292 (S.D.N.Y. 1988), and imposes
liability where one person knowingly contributes to the infringing conduct of another.
The classic statement of the doctrine is in *Gershwin*, 443 F.2d 1159, 1162: "[O]ne who,
with knowledge of the infringing activity, induces, causes or materially contributes to the
infringing conduct of another, may be held liable as a ‘contributory’ infringer." *See also*

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1 *Universal City Studios v. Sony Corp. of America*, 659 F.2d 963, 975 (9th Cir. 1981), *rev'd*
2 *on other grounds*, [464 U.S. 417](#) (1984) (adopting *Gershwin* in this circuit).”

3 *Fonovisa v Cherry Auction, Inc*, 76 F.3d 359, 264 (9th Cir., 1996).

4 As might be expected, virtually every word of that definition has been argued over and
5 over and construed in one case or another.

6 QOTD does not allege that Sonny Nguyen had actual knowledge of others engaged in
7 infringing activity and actively contributed to the infringement. QOTD limits the knowledge
8 element to some sort of *apparent knowledge* by Sonny Nguyen as the IP subscriber:

9 “..that any user of the IP address would likely have been aware of the bandwidth devoted
10 to this activity through general service slowdown throughout the observed period of
activity as residential data services typically have limited capacity...”

11 First Amended Complaint, page 4 ¶12, line 25 – Page 5, line 1.

12 | *Apparent* knowledge is not *actual* knowledge required under *Gershwin*, *supra*. This
13 allegation assumes that the person billed by COMCAST is a user of the internet at the time of
14 infringing activity and can observe a “general service slowdown” at the time of the alleged
15 downloading. This speculative presumption is too broad a stretch to jump across. In addition, a
16 general service slowdown is a common experience with Cable based internet services,
17 particularly when internet traffic exceeds COMCAST design parameters for its Cable customers
18 for a subscriber service area. It’s a question of not enough bandwidth to go around for all its
19 users at peak-user times. There is no rational jump to the conclusion that bandwidth is limited
20 due to infringing activities. Lastly, this method of becoming “aware” that infringing activity is
21 underway because of a service slowdown presumes the IP subscriber is unaware of the infringing
22 activity until a slowdown occurs, an argument against actual knowledge by the IP subscriber, if
23 it happened.
24

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1 **(2) Vicarious Infringement**

2 The second theory of secondary copyright infringement liability, that plaintiff fails to
3 properly allege is *vicarious infringement*.

4 There are two elements to a claim of *vicarious infringement* are: a) the defendant
5 possesses a right and ability to supervise infringing conduct and b) the defendant must have an
6 obvious and direct financial interest in the exploitation of the copyright material. *Broadcast*
7 *Music, Inc. v Behulak* 651 F. Supp. 57 (M.D. Fla 1980). Vicarious infringement results where
8 there has been a direct infringement by an infringer and the vicarious infringer is in a position to
9 control the direct infringer while benefiting financially from the infringement. As an example, in
10 a Ninth Circuit case, *Fonovisa Inc v Cherry Auction, supra*, the operator of a flea market where
11 counterfeit recordings were regularly sold, was found to be a vicarious infringer because the
12 operator could have policed the vendors who rented booths from him but did not. The operator
13 made money from that booth rental as well as from admission fees from the people attending the
14 flea market where the known infringement occurred. The court believed that many of the people
15 who paid those admission fees did so to gain access to the counterfeit recordings. The court
16 found the flea market operator guilty of contributory infringement with the infringer. See,”
17 *Metro-Goldwyn-Mayer Studios, Inc. v Grokster, Ltd.* 545 U.S. 913 (2005), fn 9.
18

19 But here, QOTD makes no claim that Sonny Nguyen, profits directly from the
20 infringement by another person. QOTD also fails to identify that other person---the direct
21 infringer--- who Sonny Nguyen is suppose to supervise and how. QOTD doesn’t even claim
22 that Sonny Nguyen knows about the infringement.
23
24

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1 **(3) Inducing Infringement**

2 QOTD also fails to properly allege a final theory of secondary copyright-infringement
 3 liability, *inducing infringement*: “[O]ne who distributes a device with the object of promoting its
 4 use to infringe copyright, as shown by clear expression or other affirmative steps taken to foster
 5 infringement is liable for the resulting acts of infringement by third parties.” *MGM v Grokster*,
 6 *Supra* at 936-37.

7 As with the other two theories to impute secondary liability to Sonny Nguyen, QOTD
 8 fails to identify a third party who (allegedly) committed copyright infringement. QOTD fails to
 9 describe a device that Sonny Nguyen distributes or describe a “clear expression” or other
 10 affirmative step suggesting an intent to foster infringement by another.

11 By way of contrast, in other cases, defendants have been found liable for inducing
 12 infringement by distributing electronic newsletters by “promoting software with an ability to
 13 access and copy copyrighted music,” *MGM v Grokster, supra* at 938 (2005); or by “prominently
 14 feature(ing) a list of ‘Box Office Movies’” on a website and inviting users to upload torrent files,
 15 “in other words, (the user) would be asked to upload a file that, once downloaded by other users,
 16 would lead directly to their obtaining infringing content.” *Columbia Pictures Industries, Inc. v*
 17 *Fung*, 710 F.3d 1020, 1036 (9th Cir. 2013).

18 QOTD does not allege Sonny Nguyen supplied software or, operated a website or
 19 performed any other act that can be construed to encourage, foster or induce another person to
 20 infringe anyone’s copyrighted material, let alone download a movie, “*Queen of the Desert*.”

21 Thus, the 1st Amended Complaint fails to state a claim for any of the three prongs of
 22 secondary liability recognized under copyright infringement theory. Sonny Nguyen should not be
 23

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1 listed as a defendant because others may have used his internet account, even assuming that a
2 copyright violation occurred with his assigned IP address at the time and date alleged. Lastly,
3 Sonny Nguyen should not be sued by QOTD just to learn who the infringer may be.
4

5 **SHOULD THE COMPLAINT BE DISMISSED WITH PREJUDICE?**

6 The procedural history makes clear that at the time of presenting this lawsuit, attorneys
7 for QOTD were unaware of the identity of the persons engaging in the alleged exchange of data
8 using the BitTorrent platform. As QOTD's attorney admits in its *ex parte* motion for expedited
9 discovery filed March 3, 2016 (Dk 5):
10

11 "The only way that Plaintiff can determine Defendants' actual names is from the non-
12 party Internet Service Providers ("ISP") to which Defendants subscribe and from which
13 Defendants obtain Internet access." (page 1, lines 13-16).

14 When QOTD later filed the 1st Amended Complaint, QOTD merely substituted the
15 unknown defendant Does with names of cable and internet subscribers presumable given to it by
16 COMCAST, each named defendant relating to a specific IP address for a time and date,
17 irrespective of the nature of the relationship of the defendant- subscribers to the internet, whether
18 they were infringers or only persons obligated to COMCAST for Cable and internet service.

19 As outlined above, QOTD does not allege facts sufficient to state a claim for relief. There
20 is no reason to believe that QOTD has additional access to an independent evidentiary basis to
21 ethically allege more facts sufficient to cure the defects of its 1st Amended Complaint as required
22 under rule 11 of our Federal Rules of Civil Procedure. There would be no benefit to the parties
23 to allow QOTD to file a 2nd amended complaint just to redescribe and reword theories of
24

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1 copyright infringement liability of COMCAST subscribers. QOTD should not be permitted to
 2 use the complaint process as a discovery tool. There are adequate discovery tools in the federal
 3 rules of civil procedure for that.

4
 5 **SHOULD THE COURT ORDER QOTD TO SUBMITT A MORE DEFINITE**
 6 **STATEMENT?**

7 Nevertheless, should the Court decline to dismiss the conclusionary, ambiguous and
 8 imprecise 1st Amended Complaint based on the above arguments, the Court should order QOTD
 9 to submit a more definite statement under Fed. R. Civ. P. 12(e). The Order should require
 10 QOTD to describe the specific acts with particularity, which QOTD claims constitutes
 11 infringement for each subscriber to COMCAST named as a defendant. The allegations should
 12 be specific and sufficient so that each defendant does not feel he or she is guilty of infringing a
 13 copyright merely because he or she subscribes to COMCAST.

14
 15
 16 **CONCLUSION**

17 This Court has consistently and summarily dismissed similar peer-to-peer based
 18 complaints by finding copyright infringement claims against defendants are conclusionary if
 19 based solely on the IP addresses of defendants. In an exemplary case, this Court clearly noted:

20
 21 [I]dentifying the account holder may tell us very little about who actually downloaded
 22 “The Thompsons” using that IP address. As one court noted, “it is no more likely that
 23 the subscriber to an IP address carried out a particular computer function ... than to say
 24 an individual who pays the telephone bill made a specific telephone call.” In re
BitTorrent Adult Film Copyright Infringement Cases, 2012 WL 1570765, at *3
 (E.D.N.Y, May 2,2012). In fact, it is less likely. Home wireless networks are

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1 ubiquitous, meaning that a single address can simultaneously support multiple computer
2 devices throughout the home and, if not secured, additional devices operated by
3 neighbors or passerby. Thus, the risk of false positives is very real. Digital Sin, Inc. v
4 Does 1-176, 279 F.R.D. 239, 243 (S.D.N.Y.2012). It is not clear that plaintiff could,
5 consistent with its obligations under Fed. R.Civ.P.11, make a factual contentions
6 regarding an internet subscriber's infringing activities based solely on the fact that he or
7 she pays the internet bill.

8
9 *Thompsons Film, LLC v Does 1-194*, U.S.D.C. WDW C13-0560RLS (Doc 66, page 2)
10 (ATTACHMENT A)

11
12 Respectfully submitted,

13
14 DATED: August 18, 2016

15
16 S/ Joe Chalverus
17 Joseph Chalverus
18 Attorney for Sonny Nguyen

19
20 EXHIBITS

21
22 A: Order: *Thompsons Film, LLC v Does 1-194*, USDC, WDW, C13-0560 RLS

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed with the Clerk of the Court this document and attachments using the CM/ECF system, which will send notification of such filing to:

All parties of record.

August 18, 2016

S/ Joe Chalverus
Joseph Chalverus
Attorney for Sonny Nguyen

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